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6 Attorneys for Defendant
7 NETFLIX, INC.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 DONALD CULLEN, on behalf of himself
13 and all others similarly situated,

14 Plaintiff,

15 v.

16 NETFLIX, INC.,

17 Defendant.
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Case No. 5:11-cv-01199-EJD

**DEFENDANT NETFLIX, INC.'S REQUEST
FOR JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS THIRD AMENDED
COMPLAINT**

Defendant Netflix, Inc. respectfully requests that the Court take judicial notice of the following document in support of its Motion to Dismiss the Third Amended Complaint:

Exhibit A. Plaintiff Donald Cullen’s letter to Netflix of March 2, 2011, which purports to comply with Cullen’s obligation to provide 30-days’ notice of all facts that may support a claim under the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (“Demand Letter”).

The Demand Letter is referenced in Cullen’s Third Amended Complaint (the subject of Netflix’s concurrently filed motion to dismiss) and is properly subject to the Court’s consideration. (*See, e.g.*, TAC ¶¶ 86, 87 [relying on Demand Letter in support of CLRA claim]); Fed. R. Evid. 201 (b)(2) & (c); *see also Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (“a court may consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned.”); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705 (9th Cir. 1998) (court may take judicial notice of documents “whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff’s] pleading”); *Gens v. Wachovia Mortg. Corp.*, No. 10-CV-01073, 2011 U.S. Dist. LEXIS 49709, at *6, *10–12 (N.D. Cal. May 10, 2011) (taking judicial notice of letters and other documents referenced in, and thus incorporated by reference into, complaint).

For the foregoing reasons, Netflix respectfully requests that the Court take judicial notice of Cullen’s Demand Letter.

Dated: August 20, 2012

DAVID F. MCDOWELL
JACOB M. HARPER
MORRISON & FOERSTER LLP

By: /s/ David F. McDowell

David F. McDowell
Attorneys for Defendant
NETFLIX, INC.

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Exhibit A

T H E W E S T O N F I R M

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March 2, 2011

Via Certified Mail, Return Receipt Requested

To: Mr. Reed Hastings
Chairman, and CEO, Netflix, Inc.
100 Winchester Circle
Los Gatos, CA 95032

Netflix, Inc. c/o National Registered Agents, Inc.
2875 Michelle Drive, Suite 100
Irvine, CA 92606

Re: **CLRA Demand Letter, Notice of Anticipated Litigation and Duty to Preserve Evidence**

Dear Mr. Hastings and Netflix, Inc.,

On behalf of Netflix, Inc. ("Netflix") **PLEASE TAKE NOTICE** that this letter constitutes the 30-day notice required before a suit for damages may be filed under the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* ("CLRA"). Our client, Donald Cullen, is deaf and has been a Netflix member since May 2009. Mr. Cullen relied on Netflix's promises to subtitle a substantial portion of its library of streaming video within a reasonable period to maintain his subscription, and has been harmed by Netflix's failure to do so. Further, because Mr. Cullen is effectively prevented from using Netflix's streaming video library, he must purchase a DVD subscription at a premium of at least \$1 per month versus Netflix's streaming-only plan which the hearing enjoy.

On behalf of himself, all others similarly situated, and the general public, our client hereby demands that you remedy this violation of the CLRA and other California consumer laws within 30 days of your receipt of this letter.

If you do not take prompt corrective action, including subtitling substantially all of Netflix's library of streaming video and instituting a program to refund deaf and hard-of-hearing Netflix members for their lack of access to a useable library, our client, on behalf of himself, all others similarly situated, and the general public, will seek damages under the CLRA against Netflix, seeking to compel you to take these steps as well as seeking statutory and/or punitive damages as provided for by federal and California law.

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Additionally, I remind you of your legal duty to preserve all records relevant to such litigation. See, e.g., *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 175 (S.D.N.Y. 2004); *Computer Assoc. Int'l v. American Fundware, Inc.*, 133 F.R.D. 166, 168-69 (D. Colo. 1990). Our firm anticipates that all e-mails, letters, reports, internal corporate instant messages, and records that relate to the Netflix's subtitling practices and related representations and policies will be sought in the forthcoming discovery process. You therefore must inform any employees, contractors, and third-party agents to preserve all such relevant information.

Very truly yours,

A handwritten signature in black ink, appearing to read "G. Weston".

Gregory S. Weston, Esq.